Sections 148.5 and 148.6 do not single out peace officers for special protection; they afford the same protection to everyone a law enforcement agency is required to investigate. More importantly, they protect *the agency* from launching an investigation on the basis of an allegation known to be false, the false report of a crime, against all individuals, including peace officers. It must be remembered that *Pena v. Municipal Court* only held that an allegation of misconduct under Section 832.5 did not constitute a crime report for purposes of Section 148.5. It did not hold that a crime report falsely made against a peace officer could not be the basis of a prosecution under Section 148.5.

The primary responsibility of Sheriffs' departments, municipal police agencies and other law enforcement agencies is to enforce our criminal statutes. Apart from the requirements of Section 832.5, an agency rarely, if ever, will investigate observed or reported misconduct that *does not* involve a potential criminal violation.

The provisions of Section 832.5, while imposed on every law enforcement agency in the state, *require* a department to accept allegations of *misconduct* made against employees *of its own agency*, not against the employees or officials of another agency *nor* of the employees or officials of the governmental entity of which they are an agency. By placing the mandatory duty of investigating any complaints against its officers on an employing law enforcement agency, the Legislature has created a distinction as to peace officers. A misconduct allegation against peace officers, therefore, is placed on an equal footing, by Section 148.6, with an allegation of criminal conduct under Section 148.5 that is made against every other member of

society, including peace officers and public officials. Discipline resulting from allegations of misconduct against peace officers and the ensuing investigations may be greater than the penalty imposed following a criminal conviction of a non-peace officer in many instances. Again, it is submitted that a peace officer is merely an indirect and incidental beneficiary of Section 148.6. The real beneficiary is the agency and the public it serves.

The criminal violation of either of the two sections is not to redress a wrong done to the individual officer; rather, it is to redress the wrong done to society as a whole. The wrong consists of calling on the resources of an agency whose duty is to serve the public at public expense, whose resources are limited and should not be squandered pursuing allegations known to be false when made, and to protect all segments of society, in general, from allegations known to be false when made. Surely, no one can seriously suggest that public policy should promote the making of allegations, that a public agency is mandated to investigate, when the allegations are known to be false at the time of their making. To the contrary, public policy should discourage such conduct.

The two statutes proscribe the reporting of *allegations known to be false* at the time of their making. Section 148.6 does not chill First Amendment rights. It only chills the use of allegations, known to be *false* when made, to invoke the mandated investigative duty of a law enforcement agency. In this regard, Section 148.6 should not be viewed in solitude as though it were the only penal section applicable when an allegation known to be false is directed at a peace officer. When read in conjunction with the other provisions of Chapter 7 of Title 7 of Part 1 of the Penal Code, and in particular Section 148.5, it can be seen that

any allegation, known to be false when made, *that invokes the investigative authority of a law enforcement agency* is punishable as a crime.

The two sections, when combined, cover all situations wherein a law enforcement agency are *required* to investigate, and is the equivalent of a general statute that provides criminal sanctions for making a materially false statement as to any matter within the jurisdiction of a government agency, such as 18 U.S.C. Section 1001.

By the very terms of Section 148.6, it is applicable to only peace officers, as only allegations of misconduct made against an agency's peace officer employees are required to be investigated under Section 832.5, referenced in Section 148.6. In no other instance would a law enforcement agency have jurisdiction to investigate allegations of misconduct not amounting to a crime. In the absence of Section 832.5, there is no legal mandate for a law enforcement agency to use its comprehensive investigative resources to investigate allegations of misconduct.

The mandatory investigation requirements, therefore, justify any difference of treatment as to peace officers by Section 148.6. The Legislature created the mandatory complaint provisions in Section 832.5, et seq., and so the Legislature can also create applicable penalties as to *those* complaints, as distinguished from any other complaints which may be brought in wholly different contexts against wholly different public officials not subject to those mandatory provisions.

3. The Bases Set Forth in this Court's Opinion in *R.A.V.* Render Section 148.6 Constitutional.

Section 148.6 falls within the specificed bases articulated in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), for content or viewpoint discrimination, and, therefore, is not an impermissible regulation of speech based on viewpoint, as determined by the Ninth Circuit.[3] This Court determined in *R.A.V.* that there are specific bases for content or viewpoint discrimination with respect to proscribable speech. First, "[w]hen the basis for the content discrimination consistes entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388. Second, when a "subclass [of proscribable speech] happens to be associated with particular 'secondary effects' of the speech." *Id.* at 389. For the reasons set forth in detail *supra*, Section 148.6 satisfies these bases.

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[3] Amici discuss and apply *R.A.V.* without conceding that it governs the facts presented. As the California Supreme Court noted, "*R.A.V.* involved fighting words, not knowingly false statements of fact. . . . Arguably, knowingly false statements of fact, unlike fighting words, *are* in all respects worthless and undeserving of constitutional protection." *Stanistreet*, at 506 n.4 (internal citations omitted). In particular, the statute at issue in this matter does not impose any penalty on speech between individuals, as was the circumstance in *R.A.V.* In *R.A.V.*, the government was interjecting itself into speech expressed on private property between private individuals. Here, *knowingly false* speech officially communicated to the *government*, for the purpose of causing an *unnecessary investigation* to be initiated, is criminalized. In enacting Section 148.6, the State of California sought not to impact criticism of peace officers generally, but sought to restrict the use of a particular *mode* of criticizing such employees, namely official complaints as to the misconduct of peace officers *filed* with *law enforcement agencies employing* the officers. Knowingly false complaints against officers are directly contrary to the purpose of the complaint process.

First, the California Legislature sought to balance the mandatory investigation and retention requirements of Section 832.5 with the penalty for knowingly false complaints of misconduct set forth in Section 148.6. Section 148.6 applies only to peace officers because complaints against those individuals are peculiarly subject to the requirements of Section 832.5. Moreover, Section 148.6 does not impermissibly differentiate between complaints of misconduct as to unfavored subjects, but applies equally to all such complaints against peace officers. The California Supreme Court found that this basis was satisified and that analysis is discussed in detail *infra*.

In fact, the *R.A.V.* analysis contemplated a statutory proscription like Section 148.6. The *R.A.V.* Court specifically indicated that it was not considering "a prohibition of fighting words that are directed at *certain persons or groups* (which would be *facially valid* if it met the requirements of the Equal Protection Clause)." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992) (emphasis added). Section 148.6 does just what the *R.A.V.* Court indicated *was permissible*, namely prohibiting expression that is *not* protected by the First Amendment (fighting words in *R.A.V.* and knowingly false complaints in this instance) directed at certain persons, namely peace officers.

Contrary to the Ninth Circuit's characterization, there is no protected viewpoint being expressed in the submission of a knowingly false complaint against a peace officer. Even public officials may recover for defamation where "actual malice," i.e. *knowledge* or reckless disregard for the truth or falsity of the statement, is involved. Section 148.6 makes punishable speech that this Court has repeatedly held to be unprotected by the First Amendment, *knowingly*

false statements. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

In fact, Section 148.6 does not truly impact expression in any forum for expression, but, instead, prohibits the use of *governmental* resources to initiate an investigation by a law enforcement agency, based upon *knowingly false* information. Section 148.6 "does not 'give one group an advantage over another in the *marketplace of ideas*,'" as filing a complaint with a law enforcement agency cannot reasonably be construed as communicating in the "marketplace." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 91 (1st Cir. 2004) (emphasis added).

B. The Ninth Circuit's Opinion is Contrary to the California Supreme Court's Determination that Section 148.6 is Constitutional.

The California Supreme Court previously determined the constitutionality of Section 148.6 and its analysis is directly opposed to that of the Ninth Circuit's Opinion in this matter. *People v. Atkinson (Stanistreet)*, 29 Cal. 4th 497, 508, 58 P.3d 465, 471-72, 127 Cal. Rptr. 2d 633, 640 (2002). The California Supreme Court found that the bases for content or viewpoint discrimination, discussed *supra*, applied to Section 148.6. In coming to this ultimate conclusion, the *Stanistreet* Court specifically found that knowingly false statements applied with special force to peace officers. The *Stanistreet* Court concluded as follows:

> just as the government may criminalize only threats of violence against a specific victim, the President, so too may the Legislature criminalize only knowingly false accusations against a class of victims, peace officers. To complete the analogy, what the Legislature may *not* do is criminalize

> only knowingly false accusations of illegal racial profiling.

Id. at 509, 58 P.3d at 472, 127 Cal. Rptr. 2d at 641.

The *Stanistreet* Court's analysis further emphasized that the "subclass of proscribable speech [is] . . . associated with particular secondary effects of the speech." *Id.* (internal quotations omitted). The secondary effects are the mandatory investigation and record retention requirements. Such effects are *not* present with respect to knowingly false statements *supporting* peace officers.

In addition, the record retention requirements of Section 832.5 are significant. Complaints against peace officers and any reports or findings on complaints must be maintained by law enforcement agencies for at least *five years*, such records can be maintained in an officer's *personnel file*, and management is afforded access to the records. § 832.5 (b) & (c)(1). Even complaints determined to be *frivolous, unfounded* or *exonerated* must be maintained by the agency for the requisite period. § 832.5 (c). Perhaps most importantly, all such records may become public information and released as part of civil or criminal court proceedings.[4]

The *Stanistreet* Court also specifically found that "there was no realistic possibility that official suppression

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[4] When certain procedures are followed, documents relating to complaints against peace officers are subject to disclosure in state criminal proceedings. California Evidence Code § 1043; *Pitchess v. Superior Court*, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974). Moreover, citizen complaints may not be protected from disclosure, at all, in federal proceedings. *See Soto v. City of Concord*, 162 F.R.D. 603 (N.D. Cal. 1995); *Kelly v. City of San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987); *Hampton v. City of San Diego*, 147 F.R.D. 227 (S.D. Cal. 1993).

of ideas is afoot." *Id.* (internal quotations omitted). The Court indicated that the statutory scheme *favored* complaints against peace officers, by requiring that law enforcement agencies investigate such complaints, set out procedures for addressing such complaints requiring the retention of records relating to such complaints. Section 148.6 only targets *knowingly false* complaints, so that only complaints made with actual knowledge of their falsity are suppressed, not complaints of police misconduct on any disfavored subject. The *Stanistreet* Court concluded as follows:

> If a person wants to file a complaint in a way that forces an investigation, that person may not knowingly tell a factual falsehood. The Legislature may elevate the status of a category of complaints that are particularly sensitive – like those of misconduct against peace officers – and require their investigation and rentention of records, and at the same time penalize those who invoke that status with knowingly false complaints. No one has a constitutional right to make a complaint of misconduct knowing both that the complaint must be investigated and that it is false.

Id. at 510, 58 P.3d at 473, 127 Cal. Rptr. 2d at 642.

C. Penal Code Section 148.6 is Analogous to 18 U.S.C. Section 1001.

The Federal equivalent of Section 148.5 and 148.6, 18 U.S.C. Section 1001 (Section 1001), accomplishes exactly what Sections 148.5 and 148.6 accomplish acting *in pari materia*. This Court has reviewed, and upheld, application of Section 1001 on numerous occasions. In *Brogan v.*

United States, 522 U.S. 398 (1998), this Court considered whether the statute was violated with a false "exculpatory no" in response to questions posed by federal agents from the Department of Labor and the Internal Revenue Service. This Court did not share the cavalier attitude expressed by the Appellate Department of the Superior Court in *People v. Craig*, as to the degree of harm caused by such falsehoods. This Court stated as follows:

> Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very purpose of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. . . . Moreover, as we shall see, the only support for the "perversion of governmental functions" limitation is a statement of this Court referring to the possibility (as opposed to the certainty) of perversion of function – a possibility that exists whenever investigators are told a falsehood relevant to their task.

Brogan, 522 U.S. at 401-402.

With respect to Fifth Amendment claims, *Brogan* stated as follows:

> Whether or not the predicament of the wrongdoer run to ground tugs at the heart strings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. 'Proper invocation of the Fifth Amendment privilege against compulsory self incrimination allows a witness to remain silent, but not to swear falsely.' (citations omitted.)" The petitioner, Mr. Brogan, apparently lacked the temerity to assert a First Amendment violation.

Brogan, at 404-405.

Bryson v. United States, 396 U.S. 64 (1969), also involved an interpretation of 18 U.S.C. Section 1001. Bryson was convicted of falsely denying affiliation with the Communist Party in an affidavit filed with the National Labor Relations Board. Bryson claimed, among other things, that the applicable legal requirement violated his First Amendment rights. This Court declined to examine the constitutionality of the statute at issue, holding that it was irrelevant to the validity of petitioner's conviction under Section 1001, the general criminal provision punishing the making of fraudulent statements to the Government. *Bryson*, at 68.

Bryson adopted language from *Dennis v. United States*, 384 U.S. 855, 867 (1966):

> The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's fraud. It is not an action to enforce the statute claimed to be unconstitutional.

Likewise, Section 148.6 is designed to punish the setting in motion of an investigation through false and fraudulent statements. *See also, United States v. Knox*, 396 U.S. 77 (1969).

United States v. Rodgers, 466 U.S. 475, 498 (1984), involved a Section 1001 prosecution for falsely telling the FBI and Secret Service that his wife had been kidnaped and was involved in a plot to kill the President. This Court cited an earlier case which had concluded a 1934 amendment to

the section indicated a congressional intent to protect the authorized functions of government from the perversion by deceptive practices.

This Court observed as follows:

> The FBI is authorized 'to detect and prosecute crimes against the United States,' including kidnaping. 28 U. S. C. § 533(1). And the Secret Service is authorized 'to protect the person of the President.' 18 U. S. C. § 3056. It is a perversion of these authorized functions to turn either agency into a Missing Person's Bureau for domestic squabbles. The knowing filing of a false crime report, leading to an investigation and possible prosecution, can also have grave consequences for the individuals accused of crime. There is, therefore, a 'valid legislative interest in protecting the integrity of [such] official inquiries.'

Id. (internal citations omitted).

The California Legislature considered the fact that there are hundreds of *false* complaints of peace officer misconduct filed annually. For instance, a letter submitted in support of enactment of Section 148.6 from then-Los Angeles County Sheriff pointed out that misconduct complaints "often reflect unrelated grievance[s]. These vary from angry traffic violators sulking about a ticket to manipulative criminals who feel an allegation will divert attention from their own pending criminal charges." SENATE COMMITTEE ON CRIMINAL PROCEDURE, BILL ANALYSIS, 1995-1996, AB 1732 (Cal. 1995), <http://info.sen.ca.gov/pub/95-96/bill/asm/ab_1701-1750/ab_1732_cfa_950224_164410_sen_comm.html>.

Section 148.6 targets speech that is not protected by the First Amendment, *knowingly false* speech. It also constitutionally protects law enforcement agencies and peace officers from the mandatory investigation and records retention requirements in relation to such unprotected speech.

IV. CONCLUSION.

It is respectfully urged by Amici that this Court grant the Petition for Review in order to consider the constitutionality of California Penal Code Section 148.6 and reverse the Ninth Circuit's determination in this matter on this important issue. Sections 148.5 and 148.6, taken together, form a well thought out scheme to prevent statutes, intended to encourage legitimate complaints of police misconduct, from being used as a device to swamp law enforcement agencies with knowingly false allegations that will interfere with the obligation to devote scarce resources to investigating legitimate, sincere, well-intended allegations of misconduct and reports of crime.

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Respectfully submitted,

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